85-1562 (1)
No.

Supreme Court, U.S.
FILED
MAR 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1985

No. -

NORMAN C. EDWARDS, JR.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

D. ROBERET SILBER, Esquire
Counsel of Record
Justice Building, Ste. 400E
524 S. Andrews Avenue
Ft. Lauderdale, FL 33301
305-525-8844
Fla. Bar No. 240699

DOUGLAS J. GLAID, Esquire
Glaid, DiMauro & Bernazzoli, P.A.
Trial Lawyers Building, Ste. 4F
633 Southeast Third Avenue
Ft. Lauderdale, FL 33301
305-522-3131
Fla. Bar No. 249475

March 1986

CASILLAS PRESS INC. - 1717 K ST NW WASHINGTON DC - 223-1220

29 pp

QUESTION PRESENTED

Whether it is permissible under Fed.R.Cr.P. 6(e)(4) and in accordance with due process to seal an indictment for a reason other than to gain the custody over a defendant, to-wit: tolling the applicable statute of limitations period.

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IN THE

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No. -

NORMAN C. EDWARDS, JR.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Petitioner, Norman C. Edwards, Jr., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on December 6, 1985.

OPINION BELOW

The Court of Appeals for the Eleventh Circuit filed an opinion on December 6, 1985. That opinion is officially published at 777 F.2d 644 and appears in the Appendix

hereto. (App. A). No opinion was rendered by the District Court for the Southern District of Florida.

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered on December 6, 1985. A timely Petition for Panel Re-hearing was denied on January 21, 1986, and this Petition for Certiorari was filed within sixty days of that date. (App. B). This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT V:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

FEDERAL RULES OF CRIMINAL PROCEDURE, RULE 6(e)(4):

"(4) *Sealed Indictments:* The federal magistrate to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal

the indictment and no person shall disclose the return of the indictment except when necessary for the issuance and execution of a warrant or summons."

STATEMENT OF THE CASE

On March 2, 1984, a Federal Grand Jury, sitting in Fort Lauderdale, returned a four-count indictment charging the Petitioner with conspiracy to import and possess with intent to distribute marijuana, in violation of 18 U.S.C. §2, and 21 U.S.C. §841(a)(1), 846, 952(a), 960, and 963. When the Grand Jury returned this indictment, only four days remained before the five-year statute of limitations period would expire since the last overt act relevant to this case was alleged to have occurred on March 6, 1979. Upon the Government's motion, this indictment was sealed on this date. The Government's motion to seal alleged no facts to indicate that the Petitioner might flee the District Court's jurisdiction if the existence of this indictment were made known to him.

On March 22, 1984, and the Petitioner not yet being arrested on the original indictment, a superseding indictment was returned realleging the four counts of the original indictment and adding several tax-related counts. This superseding indictment was brought sixteen days after the expiration of the five-year statute of limitations period as to the drug counts; a six-year statute of limitations period applied to the tax counts. Upon the Government's motion, the superseding indictment was also sealed. The Petitioner was arrested on March 22, 1984, twenty days after the sealing of the original indictment and when the superseding indictment was returned. In fact, no arrest warrant had been sought or obtained by the Government until the superseding indictment was returned.

On or about June 27, 1984, the Petitioner filed a motion to dismiss the drug counts against him asserting that, since the Government had no legitimate prosecutorial need to seal the original indictment, the sealing was improper and consequently did not toll the applicable statute of limitations period, 18 U.S.C. §3282. Thus, the Petitioner argued that the drug counts against him were time-barred. Subsequently, the magistrate recommended denial of the Petitioner's motion to dismiss, which recommendation was affirmed and adopted by the District Court.

On October 4, 1984, the Petitioner entered into a plea agreement with the Government wherein he plead guilty to one drug and one tax count in exchange for the Government's dismissing the remaining counts against him at the time of sentencing. Subject to the District Court's permission and pursuant to Fed.R.Cr.P. 11(a)(2), the parties agreed that the Petitioner could appeal the District Court's denial of his motion to dismiss.

On December 13, 1984, the Petitioner was sentenced to thirty months of imprisonment on the drug charge followed by a two-year special parole term. Consecutive to the drug sentence, the Petitioner was placed on probation for a period of three years during which time he must pay a $5,000.00 fine and annually perform 400 hours of community service.

Thereafter, the Petitioner timely perfected an appeal to the Eleventh Circuit Court of Appeals alleging *inter alia* that the drug charges against him were time-barred by the statute of limitations in light of the improper sealing of the original indictment. Notwithstanding, the Eleventh Circuit Court of Appeals concluded that the magistrate did not abuse her discretion in determining that the Government's decision to seal the original indictment in order to

toll the running of the statute of limitations on the drug charges until additional counts relating to tax matters could be included in a superseding indictment was a sealing for a proper prosecutorial purpose under Fed.R.Cr.P. 6(e)(4). Thus, the Eleventh Circuit Court of Appeals affirmed the Petitioner's convictions.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

The Petitioner argues the following reasons why this Petition for Writ of Certiorari should be granted:

1. The decision below conflicts with the decisions of other federal courts as to the proper interpretation of Rule 6(e)(4) of the Federal Rules of Criminal Procedure.

2. The decision below raises the significant and recurring substantial federal question concerning the propriety of the Government's practice of requesting the sealing of indictments *solely* for the purpose of tolling the applicable statute of limitations period.

I.

THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER FEDERAL COURTS AS TO THE PROPER INTERPRETATION OF RULE 6(e)(4) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

In deciding the case at bar, the Eleventh Circuit Court of Appeals interpreted Fed.R.Cr.P. 6(e)(4) to mean that an indictment may properly be sealed for reasons other than taking defendants into custody. In particular, and although the Court noted that the magistrate suggested that

the appropriate procedure would have been to have arrested the Petitioner on the original indictment and later to have susperseded that indictment with a second which added the tax counts, the Court nonetheless held that the magistrate did not abuse her discretion in determining that the Government's decision to seal the indictment in order to toll the running of the statute of limitations on the drug charges until additional tax counts could be included in a superseding indictment was a sealing for a proper prosecutorial purpose under Fed.R.Cr.P. 6(e)(4). The Petitioner submits that the decision of the Eleventh Circuit Court of Appeals necessarily conflicts with decisions of other federal courts relating to the proper purpose for sealing indictments pursuant to Fed.R.Cr.P. 6(e)(4).

Most recently, the Seventh Circuit Court of Appeals spoke of the proper purpose of Rule 6(e)(4) of the Federal Rules of Criminal Procedure in the case of *Worrell Newspapers of Indiana, Inc. v. Westhafer,* 739 F.2d 1219 (7th Cir. 1984). Citing for support several other federal case authorities, the Court in *Worrell* stated as follows:

> "We agree that courts have the power to seal indictments or informations, under appropriate circumstances, *to facilitate the apprehension of criminals.* See generally, *United States v. Muse,* 633 F.2d 1041 (2d Cir. 1980) (*en banc*), *cert. denied,* 450 U.S. 984, 101 S.Ct. 1522, 67 L.Ed. 2d 820 (1981); *United States v. Slochowsky,* 575 F.Supp. 1562 (E.D.N.Y. 1983). For federal courts, Rule 6(e)(4) of the Federal Rules of Criminal Procedure formally embodies this judicial power. . . . The obvious purpose behind these provisions is to prevent the requirement of an indictment from serving as public notice that would enable the defendant to avoid arrest." *Muse,* 633 F.2d at 1043.

Id. at 1222-1223. (Emphasis supplied).

From the above-quoted language, it can be fairly gathered that the real purpose behind the sealing rule is to gain custody over a defendant and not for other reasons which do not relate to the arrest of a defendant. In light of the language contained in *Worrell,* the Petitioner submits that the Seventh Circuit Court of Appeals would not consider as an "appropriate circumstance" the sealing of an indictment solely to curtail one's rights under the statute of limitations.

In *United States v. Watson,* 599 F.2d 1149 (2d Cir. 1979), the Second Circuit Court of Appeals thoroughly discussed Fed.R.Cr.P. 6(e)(4) and held that there must be limits on the Government's privilege to toll the statute of limitations by a sealed indictment. The Court set forth the following standard to be applied in cases where, as here, a sealed indictment has tolled the statute of limitations. In particular the Court stated as follows:

> "We believe that when a sealed indictment has tolled the statute of limitations, the policy of repose underlying the statute *demands* that the Government unseal the indictment as soon as its *legitimate need for delay* has been satisfied." *Id.* at 1154. (Emphasis supplied).

The Court said that it based this standard in part upon the language of the statute of limitations itself, 18 U.S.C. §3282, which provides that an indictment must be found within five years of the offense "except as otherwise expressly provided by law." Citing this Honorable Court's cases of *Toussie v. United States,* 397 U.S. 112 (1970) and *United States v. Marion,* 404 U.S. 307 (1971), the *Watson* court stated that, "This language is a clear warning that the exception created by Fed.R.Cr.P. 6(e)(4) *must be construed strictly." Id.* at 1154.

The Second Circuit Court of Appeals in *Watson* further interpreted Fed.R.Cr.P. 6(e)(4) as follows:

> "In light of this strong policy of notifying criminal defendants of the charges against them so that they may prepare a defense, the extension of the statutory limitations period implicitly permitted by Fed.R.Cr.P. 6(e) must be confined to *reasonable limits.* This standard permits an extension *only* to the degree necessary to accommodate the *prosecutorial interests* that the sealing of an indictment *legitimately* furthers." *Id.* at 1155. (Emphasis supplied).

The *Watson* court also noted that the standard it had announced was consistent with two other federal cases which interpreted the limits of the Fed.R.Cr.P. 6(e) extension of the limitations period, *United States v. Heckler,* 428 F.Supp. 269 (S.D.N.Y. 1976) and *United States v. Sherwood,* 38 F.R.D. 14 (D.Conn. 1964). In *Sherwood,* the Court carefully analyzed the policies underlining Fed.R.Cr.P. 6(e) and concluded that the sealing of an indictment ". . . must be *necessary,* of reasonable duration under the circumstances, *and* exercised *only* to accomplish the limited purposes authorized by the criminal rule for which it was designed." *Id.* at 20. (Emphasis supplied). The facts in *Sherwood* indicated that the Government's only reason for keeping an indictment sealed for an eleven-month period was to determine the validity of a third defendant's allegation the Government had promised him immunity. The *Sherwood* court strongly implied that this reason was not one of the authorized purposes of Rule 6(e).

In *United States v. Heckler,* 428 F.Supp. 269 (S.D.N.Y. 1976), the Court dismissed an indictment filed less than one month before the limitations period expired and was

unsealed after the limitations period. Although the Court's holding was based not simply upon Fed.R.Cr.P. 6(e) but also upon the Due Process Clause, the Court nevertheless stated, "When the defendants are available, the Government may not seal an indictment for more than a reasonable time after the statute of limitations has expired." *Id.* at 272. As a result, the Court concluded that the delay was impermissible because the Government failed to assert a proper purpose for the delay, as was the case herein.

Subsequent to the *Watson* case, *supra,* the Second Circuit Court of Appeals *en banc* interpreted Fed.R.Cr.P. 6(e)(4) in the case of *United States vs. Muse,* 633 F.2d 1041 (2d Cir. 1980) as follows: "The obvious purpose of this provision [Fed.R.Cr.P. 6(e)(4)] is to prevent the requirement of an indictment from serving as a public notice that would enable the defendant to avoid arrest." *Id.* at 1043. Moreover, the Court held that the "power granted to the Government" by Fed.R.Cr.P. 6(e)(4) is based upon the "legitimate prosecutorial needs of the Government to *capture* those properly indicted for criminal activity." *Id.* at 1043. (Emphasis supplied). Although the Court in *Muse* affirmed the defendant's conviction since the Government's prosecutorial interest in keeping the indictment sealed past the limitations period was substantial, the Court noted that the Government initially sealed the indictment, and kept it sealed past the limitations period, because it feared tht the indictment and arrest of Muse would cause his co-defendants to flee. Muse, like the Petitioner herein, himself could have been captured at any time during the period in question. As a result, the Second Circuit Court of Appeals pointed out that had Muse been the sole defendant, "the Government might be hard put to justify its delay." *Id.* at 1044.

The Petitioner submits that it is quite obvious that the above-cited federal cases are in complete and direct conflict with the decision of the Eleventh Circuit Court of Appeals *sub judice* relating to the proper interpretation of Fed.R.Cr.P. 6(e)(4). It is clear that the sealing of the indictment in the case at bar did not meet the standard set forth in the *Watson* case, *supra.* For, there existed absolutely no "legitimate need for delay" with respect to the sealing of the indictment. The sealing was not confined to "reasonable limits." Furthermore, the sealing did not accommodate any "legitimate prosecutorial interests." In short, the sealing was completely unnecessary and exercised only to accomplish an improper and unauthorized purpose, to-wit: tolling the statute of limitations period.

Although the *Sherwood* and *Heckler* caes, *supra*, are not court of appeals decisions, the Petitioner suggests that the holdings in these decisions demonstrate the importance of the question involved herein and that the decision of the Eleventh Circuit Court of Appeals *sub judice* reflects an area of the law concerning the proper purpose of Fed.R Cr.P. 6(e)(4) productive of different judicial responses. Consequently, a decision by this Honorable Court is needed in order to resolve this important question and to resolve conflicts which presently exist among various federal courts.

In conclusion, this case presents an important problem regarding the proper construction of Fed.R.Cr.P. 6(e)(4). As seen from the above-cited cases, it is quite likely that various federal courts will continue to interpret Fed.R. Cr.P. 6(e)(4) differently unless and until this Court exercises its power of supervision to finally resolve this issue. It is clear that uniformity is needed to the proper use by Government prosecutors of Fed.R.Cr.P. 6(e)(4). How-

ever, uniformity will not exist until this Honorable Court has spoken. Consequently, a writ of certiorari should issue so that the conflict among the various federal courts on this question may be immediately resolved and uniformity achieved.

II.

THE DECISION BELOW RAISES THE SIGNIFICANT AND RECURRING SUBSTANTIAL FEDERAL QUESTION CONCERNING THE PROPRIETY OF THE GOVERNMENT'S PRACTICE OF REQUESTING THE SEALING OF INDICTMENTS *SOLELY* FOR THE PURPOSE OF TOLLING THE APPLICABLE STATUTE OF LIMITATIONS PERIOD.

In *Toussie v. United States,* 397 U.S. 112 (1970), this Court succinctly set forth the policy behind criminal limitations statutes as follows:

> "The purpose of a statute of limitation is to limit exposure to criminal prosecutions to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past." *Id.* at 114-115.

The Petitioner submits that the Government should not be allowed to casually defeat the purpose of criminal statutes of limitations as stated above simply by moving to seal an indictment when absolutely no articulable reason for doing so exits or is alleged, as was the case here.

The presence of notice is required to toll a statute of

limitation. Without notice, a statute of limitations must expire. As stated in *United States v. Grady,* 544 F.2d 598 (2d Cir. 1976), the policy of a statute of limitations is to put an accused on notice of the charges against him within the statutory time frame. The Petitioner claims that this requirement is in accordance with the basic requirement of due process of law.

However, in the case at bar, the Petitioner was clearly not put on notice as to the drug charges against him until after the statute of limitations period had expired. Consequently, the Petitioner essentially had no rights under the statute of limitations whatsoever and was clearly denied his constitutional right to due process of law. This result is fundamentally unfair and is very likely to be repeated in other cases throughout this nation unless this Court finally settles this important federal question as to when and under what circumstances it is proper for federal magistrates throughout this country to seal indictments. In this regard, the federal judiciary desperately needs guidance so that all persons accused of crimes may be truly afforded due process of law.

As stated in *United States v. Watson, supra,* there must be limits on the Government's privilege to toll the statute of limitations by sealing an indictment. *Id.* at 1154. As with any privilege, this privilege can easily be abused. This is especially so when no standards exist regarding the reasons justifying the sealing of indictments, as is the present case. The Petitioner submits that the Government's privilege to toll the statute of limitations by a sealed indictment was abused to the extent of violating due process when the Government requested the sealing of the indictment without proffering any justification or factual basis whatsoever for doing so.

The intentional curtailing of one's statutory and constitutional rights by the Government through the use of a federal procedural rule, i.e., Fed.R.Cr.P. 6(e)(4), is fundamentally unfair, cannot be condoned and clearly deprives one of due process of law. As a result, this Court should resolve this important federal question as to the proper use and parameters of Fed.R.Cr.P. 6(e)(4) so that the Government's "privilege" to toll the statute of limitations will not be abused. Further, resolution is needed so that the judiciary may have standards by which to judge Government requests to seal indictments. For, without any uniform standards, without any guidance as to what reasons justify the sealing of indictments, abuses of Fed.R.Cr.P. 6(e)(4) can and will only continue to increase. And, the unfortunate effects of any abuses are to completely frustrate the policy behind statutes of limitations, to deny those accused of crimes of their rights thereunder, and to unduly infringe upon an accused's constitutional right to due process of law.

Surely, the issue herein matches competing interests – the Government's duty to prosecute those accused of crimes and an accused's rights to not be exposed to criminal prosecution for an indefinite period of time and due process of law. The balancing of these competing interests certainly is a difficult and delicate task. However, this task must be performed in order to truly afford those accused of crimes due process of law. Consequently, this Court should resolve the question presented herein for the benefit of the Government, the judiciary and citizenry.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

D. ROBERET SILBER, Esquire
Justice Building, Ste. 400E
524 S. Andrews Avenue
Ft. Lauderdale, FL 33301
305-525-8844
Fla. Bar No. 240699

By:
D. ROBERT SILBER
Fla. Bar No. 240699

GLAID, DiMAURO & BERNAZZOLI, P.A.
Trial Lawyers Building, Ste. 4F
633 Southeast Third Avenue
Ft. Lauderdale, FL 33301
305-522-3131
Fla. Bar No. 249475

BY:
DOUGLAS J. GLAID
Fla. Bar No. 249475

Counsel for Petitioner

March 1986

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Norman C. EDWARDS, Jr., Robert H. Bolden, Jr., Defendants-Appellants.

No. 84-5968.

United States Court of Appeals,
Eleventh Circuit.

Dec. 6, 1985.

* * *

D. Robert Silber, Harry Hipler, Ft. Lauderdale, Fla., for defendants-appellants.

Sky E. Smith, Smith & Gellman, Miami, Fla., for Bolden.

Caroline Heck, Asst. U.S. Atty., Miami, Fla., Glenn L. Archer, Jr., Asst. Atty. Gen., Michael L. Paup, Chief, Appellate Section, Robert E. Lindsay, Donald W. Searles, Tax Div., Dept. of Justice, Washington, D.C., for plaintiff-appellee.

Appeals from the United States District Court for the Southern District of Florida.

Before FAY and JOHNSON, Circuit Judges, and HOFFMAN,* District Judge.

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*Honorable Walter E. Hoffman, U.S. District Judge for the Eastern District of Virginia, sitting by designation.

WALTER E. HOFFMAN, District Judge:

A four-count indictment on March 2, 1984, charged defendants Norman C. Edwards, Jr.. and Robert H. Bolden, Jr. with conspiracy to import and to possess with intent to distribute marijuana, in violation of 18 U.S.C. § 2, and 21 U.S.C. §§ 841(a)(1), 846, 952(a), 960, and 963. Upon the government's motion, this indictment was immediately sealed.

On March 22, 1984, a superseding indictment realleged the four counts of the original indictment and added numerous tax-related counts. Counts VII and VIII charged Bolden with violations of 26 U.S.C. § 7201, attempting to evade and defeat income taxes due the United States. Counts IX, X and XI charged Edwards with violations of 26 U.S.C. § 7206(1), willfully subscribing tax returns which he did not believe to be true and correct. Upon the government's motion, the superseding indictment was also sealed. Bolden and Edwards were arrested on March 22, 1984.

The district court affirmed and adopted the recommendations of the magistrate that the defendants' various motions to dismiss be denied. On October 4, 1984, Edwards entered into a plea agreement with the government, pleading guilty to one drug and one tax count in exchange for the government's dismissing the remaining counts at the time of sentencing. Subject to the court's permission and pursuant to Fed.R.Cr.P. 11(a)(2), the parties agreed that Edwards could appeal the court's denial of his motion to dismiss. On October 9, 1984, Bolden entered into a similar plea agreement, likewise preserving his right to appeal the denial of his motion to dismiss.

The district court accepted Edwards' and Bolden's conditional guilty pleas. On December 13, 1984, Bolden was

sentenced to 48 months of imprisonment followed by a two-year special parole term and a fine of $15,000 on the drug charge. On the tax charge, Bolden is placed on five years probation to be served upon completion of his sentence. Additionally, Bolden must pay a fine of $10,000 and perform 400 hours of community service annually during his probation period.[1] The court sentenced Edwards to 30 months of imprisonment on the drug charge, followed by a two-year special parole term. Upon completion of the drug sentence, Edwards is placed on probation for three years on the tax count, must pay a $5,000 fine, and must perform 400 hours of community service annually during the probation period.[2]

We affirm the judgments of conviction, based upon the conditional pleas of guilty in these cases which have been consolidated for appellate purposes.

DISCUSSION

Sealed Indictment

Defendants assert that Counts I through IV found in the first indictment and realleged in the second indictment should be dismissed as time barred by 18 U.S.C. §

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[1]The actual language of the order states, in pertinent part: "ORDERED AND ADJUDGED that imposition of sentence of confinement shall be withheld as to Count Eight and upon completion of defendant's sentence as to Count One and any parole term which may occur, the defendant shall be placed on probation for a period of FIVE (5) YEARS under the Standing Conditions of Probation as defined by the Court's Order entered August 1, 1964, and upon the following special conditions of probation." (R. 471) However, since sentences must be imposed immediately and not withheld, we construe the quoted language to mean that Bolden's sentence of probation was imposed on December 13, 1984.

[2]The actual language of Edwards' sentence also indicates that imposition of sentence is withheld. (R. 473) We construe this language to mean that the sentence of probation was imposed on December 13, 1984.

3282.[3] When the grand jury returned the first indictment on March 2, 1984, four days remained before the five-year deadline expired on the drug charges.[4] The superseding indictment, returned March 22, 1984, was brought sixteen days after the expiration of the five-year statute of limitations as to the drug counts; the tax counts have a six-year limitation. The original indictment was clearly timely filed. In general, a statute of limitations is tolled by the timely filing of an indictment. *United States v. Grady,* 544 F.2d 598, 601 (2d Cir.1976).

Furthermore, the government may properly request the sealing of an indictment for a period beyond the statute of limitations. An indictment sealed pursuant to Fed. R.Cr.P. 6(e)(4)[5] is timely even though the defendant is not arrested and the indictment is not made public until after the end of the statutory limitations period. *United States v. Muse,* 633 F.2d 1041 (2d Cir.1980) (*en banc*), *cert. denied,* 450 U.S. 984, 101 S.Ct. 1522, 67 L.Ed.2d 820 (1981); *United States v. Michael,* 180 F.2d 55 (3d Cir.

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[3]18 U.S.C. § 3282 states:

> Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

[4]The last overt act relevant to these cases is alleged to have occurred on March 6, 1979.

[5]Fed.R.Cr.P.6(e)(4) states:

> The federal magistrate to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the return of the indictment except when necessary for the issuance and execution of a warrant or summons.

1949), *cert. denied, sub nom., United States v. Knight,* 339 U.S. 978, 70 S.Ct. 1023, 94 L.Ed. 1383 (1950). Therefore, the government's actions in requesting the sealing of the original indictment are consistent with those contemplated under the aegis of Fed.R.Cr.P. 6(e)(4).

Defendants also assert that the government's reasons for seeking to seal the original indictment were improper. Both Edwards and Bolden maintain that an indictment may not be sealed for the government's convenience and contend that the government's action deprived them of due process. *See United States v. Watson,* 599 F.2d 1149, 1155 (2d Cir.1979), *modified sub nom. United States v. Muse,* 633 F.2d 1041 (2d Cir.1980) (*en banc*), *cert. denied,* 450 U.S. 984, 101 S.Ct. 1522, 67 L.Ed.2d 820 (1981) (government may not request the sealing of an indictment for more than a reasonable time after statute of limitations has expired). Edwards argues that the government had no legitimate prosecutorial need to seal the original indictment and asserts that Counts I through IV consequently should be dismissed. In support of this argument, Edwards relies upon a narrow interpretation of Fed.R.Cr.P. 6(e)(4), that the only valid reasons for sealing an indictment are to locate and to gain custody over defendant. *See, e.g., Watson,* 599 F.2d at 1155; *United States v. Cosolito,* 488 F.Supp. 531 (D.Mass.1980); *United States v. Sherwood,* 38 F.R.D. 14, 20 (D.Conn.1964). We do not accept this limiting interpretation of the Federal Rules of Criminal Procedure.

Prosecutorial Purpose

A recent decision of the Second Circuit addresses precisely the issue raised in this appeal: what reasons justify the sealing of an indictment. In *United States v.*

Southland, 760 F.2d 1366 (2d Cir.1985), Judge Friendly provides an analytical and historical perspective to Fed. R.Cr.P. 6(e)(4). *Southland* cites an opinion by Judge Maris written only three years after the Criminal Rules were adopted:

> Criminal Procedure Rule 6(e) authorizes indictments to be kept secret during the time required to take the defendant into custody. If such secrecy may lawfully be imposed in that situation we see nothing unlawful in the court imposing secrecy in other circumstances which in the exercise of a sound discretion it finds call for such action.

United States v. Michael, 180 F.2d 55, 57 (3d Cir.1949), *cert. denied sub nom. United States v. Knight,* 339 U.S. 978, 70 S.Ct. 1023, 94 L.Ed. 1383 (1950). Judge Friendly concludes that the *Michael* court would scarcely have made the statement if the taking of custody had been the sole objective of Fed.R.Cr.P. 6(e)(4). *Southland,* 760 F.2d at 1379.

Southland continues its historical analysis by delving into the practice of the courts at the time the Rule was written and concludes that courts then ordered an indictment to be sealed, "[W]here the public interest requires it, or for other sufficient reason,"[6] or "for sound reasons of

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[6]Hansel & Walser, *Defending and Prosecuting Federal Criminal Cases,* § 230, at 300 (2d ed. 1946); *accord* 1 Matthews, *How to Try a Federal Criminal Case* § 215, at 318-19 (1960).

policy."[7] *Southland,* 780 F.2d at 1379, 1380. Judge Friendly also explains that the Federal Rules of Criminal Procedure were not meant to be exhaustive. Therefore, that the Rule omits an enumeration of the reasons for which an indictment may be sealed is not to be read as a restriction on those reasons. In sum, reasons other than taking defendants into custody validly support the sealing of an indictment.

Magistrate's Decision

In the present case, we must decide whether the prosecutorial needs and objectives justified the sealing of the indictment. Again, the words of Judge Friendly are instructive:

> This is a point on which great deference should be accorded to the discretion of the magistrate, at least in the absence of any evidence of substantial prejudice to the defendant. The Government should be able, except in the most extraordinary cases, to rely on that decision rather than risk dismissal of an indictment, the sealing of which it might have been willing to forego, because an appellate court sees things differently, after the expenditure of vast resources at a trial and at a time when reindictment is by hypothesis impossible.

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[7]These words were used to describe present practice by Judge George Medalie, Associate Judge of the New York Court of Appeals, former United States Attorney for the Southern District of New York and member of the Supreme Court Advisory Committee on Criminal Rules. The occasion was a symposium on the Rules of Criminal Procedure sponsored by the New York University School of Law; the American Bar Association, and the Federal Bar Association. VI *Proceedings of the New York University Law School Institute on the Federal Rules of Criminal Procedure,* 155 (1946).

Southland, 760 F.2d at 1380. Defendants argue at length that the colloquy which transpired between the magistrate and the government counsel regarding the need to seal the indictment is reflective of an improper purpose, *i.e.,* a purpose other than the need to take the defendant into custody. In fact, the record shows that the magistrate does suggest that an appropriate procedure would have been to have arrested the defendants on the original indictment and later to have superseded that indictment with a second which added the tax counts. The tax counts are subject to a six-year statute of limitations and, unlike the drug counts, were not threatened by a time bar, on March 2, 1984.

If, as Edwards argues, the magistrate recognized that the government's only reason for filing the original indictment was to toll the running of the statute of limitations, the magistrate nonetheless granted the government's motion to seal the indictment. We align ourselves with the Second Circuit in according great deference to the discretion of the magistrate. Tolling the statute of limitations on charges of conspiracy to import with intent to distribute thousands of pounds of marijuana is arguably required by the public interest and supported by sound reasons of policy. We uphold the discretion of the magistrate in this decision and find that her suggestion of an alternative procedure is not necessarily indicative of a questionable prosecutorial objective.

Actual Prejudice

The plethora of cases which the defendants cite in support of their motion to dismiss the counts allegedly time barred contain a common thread. Courts have dismissed indictments maintained under seal beyond the limitation period only upon a showing of substantial, irreparable, ac-

tual prejudice to the defendants. *See e.g., United States v. Watson,* 599 F.2d 1149 (2d Cir.1979), (*en banc*) *modified sub nom. United States v. Muse,* 633 F.2d 1041 (2d Cir.1980), *cert. denied,* 450 U.S. 984, 101 S.Ct. 1522, 67 L.Ed.2d 820 (1981); *United States v. Slochowsky,* 575 F.Supp. 1562 (E.D.N.Y.1983); *United States v. Cosolito,* 488 F.Supp. 531 (D.Mass.1980); *United States v. Heckler,* 428 F.Supp. 269 (S.D.N.Y.1976). In the present case, the magistrate found no prejudice to the defendants. Although the defendants allege that they were prejudiced by the twenty-day sealing of the indictment, they make no factual showing as to the inaccessibility of witnesses, the diminution of memories, or other indicia of actual prejudice. Therefore, we find that the defendants were in no way prejudiced by the sealing of the indictment and that the twenty-day sealing was not an unreasonable prosecutorial delay.

Superseding Indictment

The government's superseding indictment, returned March 22, 1984, realleged precisely the drug charges, Counts I through IV, and added tax charges, Counts VII through XI which are relevant to this appeal. Clearly, a prosecutor may seek a superseding indictment at any time prior to trial on the merits, so long as the purpose is not to harass the defendant. *United States v. Del Vecchio,* 707 F.2d 1214, 1216 (11th Cir.1983). The record indicates no governmental intent to harass either defendant by the superseding indictment.

Defendants contend that the superseding indictment is impermissible because it broadens and substantially amends the charges made in the original indictment. *United States v. Grady,* 544 F.2d 598, 602 (2d Cir.1976). However, the superseding indictment realleged exactly the

charges brought in Counts I through IV of the original indictment. These counts were neither broadened nor amended and, therefore, do not violate the *Grady* guidelines. As previously established, these drug charges were timely brought and the indictment properly sealed for a reasonable time.

The tax charges against the defendants added in Counts V through XI are subject to a six-year statute of limitations[8] and were timely brought in the superseding indictment. These added charges did not improperly broaden or amend the original charges and did not violate the guidelines of *Grady*, 544 F.2d at 602. *See also United States v. Friedman,* 649 F.2d 199, 204 (3d Cir.1981) (substantial alteration of the charges); *United States v. O'Neil,* 463 F.Supp. 1205, 1207 (E.D.Pa.1979) (substantial amendment of the original indictment). The tax charges did put the defendants on notice, in a timely manner, of those charges against which they had to defend. *Toussie v. United States,* 397 U.S. 112, 114-15, 90 S.Ct. 858, 859-60, 25 L.Ed.2d 156 (1970). The superseding indictment is, therefore, entirely appropriate; the charges therein should not be dismissed.

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[8]26 U.S.C.§ 6531 says in pertinent part:

> No person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal revenue laws unless the indictment is found or the information instituted within 3 years next after the commission of the offense, except that the period of limitation shall be 6 years
>
> (1) for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner . . .
>
> (5) for offenses described in sections 7206(1) and 7207 (relating to false statements and fraudulent documents;

Misdemeanor or Felony

Defendant Bolden poses an interesting question as to whether a taxpayer who does not file a return may be prosecuted under 26 U.S.C. § 7201.[9] Bolden maintains that Counts VII and VIII of the superseding indictment do not charge violations of § 7201 because they do not allege any affirmative act constituting an evasion or attempted evasion of tax. Bolden concedes that the two counts contain appropriate language to permit his conviction under the misdemeanor statute for willful failure to file a tax return or pay a tax, § 7203.[10]

The test to determine the adequacy of an indictment is set forth in *Hamling v. United States,* 418 U.S. 87, 117, 94 S.Ct. 2887, 2907, 41 L.Ed.2d 590 (1974):

> . . . an indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charges against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense.

Additionally, an indictment that adheres to the language of the statute is generally sufficient so long as the indict-

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[9]26 U.S.C. § 7201 provides:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony. . . .

[10]26 U.S.C. § 7203 provides:

> Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015); keep any records, or supply any information at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor.

ment sets forth the essential elements of the crime. *Hamling,* 418 U.S. at 117, 94 S.Ct. at 2907; *United States v. Harrell,* 737 F.2d 971, 975 (11th Cir.1984), *cert. denied,* ____ U.S. ____, 105 S.Ct. 1392, 84 L.Ed.2d 781 (Sup.Ct. 1985); *United States v. Ramos,* 666 F.2d 469, 474 (11th Cir.1982).

The essential elements that must be established to prove a violation of § 7201 are willfulness, the existence of a tax deficiency, and an affirmative act constituting an evasion or attempted evasion of the tax. *Sansone v. United States,* 380 U.S. 343; 351, 85 S.Ct. 1004, 1010, 13 L.Ed.2d 882 (1965). Thus, the essential elements stated in Bolden's indictment are that he (1) failed to make a return and (2) failed to pay the tax (3) by concealing and attempting to conceal from all proper offices of the United States of America his true and correct taxable income. The primary inquiry focuses upon the third element. Does the allegation of concealing or attempting to conceal income charge an affirmative act of tax evasion and not state a mere legal conclusion as Bolden contends? Our inquiry is whether concealing income is a distinct form of conduct made criminal with respect to which the requisite criminal intent of willfulness exists. *U.S. v. Platt,* 435 F.2d 789, 793 (2d Cir.1970). We find that concealing income, alleged in the conjunctive with other acts in Counts VII and VIII, is a willful commission as required by § 7201.

Bolden relies on *United States v. McNulty,* 528 F.2d 1223 (9th Cir.1976), *cert. denied,* 425 U.S. 972, 96 S.Ct. 2170, 48 L.Ed.2d 796, as an example of a proper indictment for an affirmative act of concealment of income. The *McNulty* court observed that the indictment charged "with particularity the times, the amounts, and the methods and manner by which McNulty sought to willful-

ly and knowingly attempt to evade and defeat said income tax. . . ." *McNulty,* 528 F.2d at 1225. However, in revenue offenses, an allegation of the particular means by which the defendant attempted to evade and defeat the tax is not required. *Reynolds v. United States,* 225 F.2d 123, 126 (5th Cir.1955), *cert. denied,* 350 U.S. 914, 76 S.Ct. 197, 100 L.Ed. 801 (1955); *United States v. Miro,* 60 F.2d 58, 60-61 (2d Cir.1932); *Capone v. United States,* 56 F.2d 927, 931 (7th Cir.1932), *cert. denied,* 286 U.S. 553, 52 S.Ct. 503, 76 L.Ed. 1228 (1932). Additionally, language substantially similar to that used in Counts VII and VIII of the present case has been held sufficient to allege a violation of § 7201. *Elwert v. United States,* 231 F.2d 928, 931-32 (9th Cir.1956). Consequently, we find that Counts VII and VIII adequately allege an affirmative act of tax evasion as required by § 7201 and hold that defendant Bolden's plea of guilty on Count VIII is affirmed.

Privilege Against Self-Incrimination

Defendant Edwards appeals the district court's denial of his motion to dismiss Counts IX, X, and XI of the superseding indictment. These counts allege violations of 26 U.S.C. § 7206(1).[11] Edwards argues first that the three counts violate his Fifth Amendment privilege against self-incrimination. Edwards is charged with willfully filing an income tax return that he did not believe to be true and

[11]26 U.S.C. § 7206(1) provides in pertinent part:

> Any person who –
> (1) *Declaration under penalties of perjury* – Willfully makes and subscribes any return, statement or other document, which contains or is verified by a written declaration that it is made under penalties of perjury, and which he does not believe to be true and correct as to every material matter; . . . shall be guilty of a felony . . . .

correct as to every material matter. The government asserts that Edwards understated the amount of his income by failing to disclose that he had received substantial gross receipts from the distribution of marijuana.

Edwards argues that he may apply the Fifth Amendment privilege against self-incrimination in not revealing either the source or the amount of his income, citing *Garner v. United States,* 424 U.S. 648, 96 S.Ct. 1178, 47 L.Ed.2d 370 (1976) and *United States v. Paepke,* 550 F.2d 385 (7th Cir.1977). What Edwards fails to acknowledge are the limited circumstances under which a taxpayer may decline to state the amount of his income, *i.e.,* when the amount alone might have incriminated him. The facts of Edwards' situation do not support such a position. As the court noted in *Paepke,* the defendant had a choice; he could have listed the amount of his income, paid the proper tax, and claimed the Fifth Amendment privilege as to its source. *Paepke,*550 F.2d at 391.

Since Edwards failed to disclose not only the source of but also the amount of substantial gross receipts, he may not rely on those cases which hold that the source of income may be privileged. *United States v. Goetz,* 746 F.2d 705, 710 (11th Cir.1984); *United States v. Vance,* 730 F.2d 736, 738 (11th Cir.1984); *United States v. Pilcher,* 672 F.2d 875 (11th Cir.1982), *cert. denied,* 459 U.S. 973, 103 S.Ct. 306, 74 L.Ed.2d 286 (1982); *United States v. Booher,* 641 F.2d 218, 220 (5th Cir.1981); *United States v. Johnson,* 577 F.2d 1304, 1311 (5th Cir.1978), *rehearing denied,* 584 F.2d 389 (5th Cir.1978). Uniformly, these cases also held that the amount of a taxpayer's income is not privileged. Therefore, Edwards' Fifth Amendment argument is without merit.

Burden of Proof

Edwards' contention that the prosecution unconstitutionally shifted the burden of proof onto him to prove his innocence is also unsuccessful and frivolous. In order to sustain a conviction under 26 U.S.C. § 7206(1), the government must prove that: (1) there was a making and subscribing of a tax return which contained a written declaration that it was made under the penalties of perjury; (2) the maker or subscriber did not believe the return to be true and correct as to every material matter; and (3) the maker or subscriber acted in a willful, as opposed to a negligent manner. *See United States v. Fontenot,* 628 F.2d 921 (5th Cir.1980), *cert. denied,* 452 U.S. 905, 101 S.Ct. 3030, 69 L.Ed.2d 406 (1981); *Hoover v. United States,* 358 F.2d 87 (5th Cir.1966), *cert. denied,* 385 U.S. 822, 87 S.Ct. 50, 17 L.Ed.2d 59 (1966). The courts have also provided examples of material false statements. *United States v. Holladay,* 566 F.2d 1018, 1020 (5th Cir. 1978), *cert. denied* 439 U.S. 831, 99 S.Ct. 108, 58 L.Ed.2d 125 (1978) (failure to report substantial gross receipts); *United States v. Garcilaso de la Vega,* 489 F.2d 761, 765 (2d Cir.1974) (failure to report income from an illegal business); *United States v. DiVarco,* 343 F.Supp. 101, 103-104 (N.D.Ill. 1972), *aff'd,* 484 F.2d 670 (7th Cir.1973), *cert. denied* 415 U.S. 916, 94 S.Ct. 1412, 39 L.Ed.2d 470 (1974) (failure to report correctly the source of income). Once the prosecutor has met his burden of proof with regard to each of these elements, the government has established a prima facie case under § 7206(1). However, in the present case, which never came to trial because the defendant pleaded guilty, the allegation that the government shifted the burden of proof by claiming that the defendant was in the business of selling drugs in an income tax case is an irrelevant argument.

Notice

Edwards also alleges a violation of the right to be placed on notice in regard to what is illegal conduct pursuant to § 7206(1). In his brief, defendant claims that he was charged with failing to disclose substantial gross receipts on Schedule C and that Schedule C is not a requirement of the Internal Revenue Code or Regulations. The relevant wording of Counts IX, X, and XI alleges that Edwards "failed to disclose, on an attached schedule C, *or otherwise,* that . . . [he] had received . . . substantial gross receipts from a business activity. . . ." (Emphasis added.) The critical element of the counts is Edwards' failure to disclose, not his failure to use Schedule C. In regard to another defendant's failure to file or filing of false and fraudulent Schedules E and F, a court noted:

> While there is no explicit requirement in the regulations for the completion and filing of Schedules E and F, it is implicit in required Form 1040 that such schedules, when appropriate, become integral parts of such form and are incorporated therein by reference . . . . Therefore, we conclude that section 7206(1) required the same duty of honest reporting on schedules as it requires for entries on the Form proper.

United States v. Taylor, 547 F.2d 232, 237 (5th Cir.1978). By analogy, we reason that the holding in *Taylor* applies to schedule C as well. Edwards' reliance on *United States v. Levy,* 533 F.2d 969, 970-971 (5th Cir.1976), to support his argument that no internal revenue law or regulation requires the filing of a Schedule C is, therefore, misplaced.

For the reasons stated above we **AFFIRM** the judgments of conviction of Norman C. Edwards, Jr. and Robert H. Bolden, Jr.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-5968

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

NORMAN C. EDWARDS, JR.,
ROBERT H. BOLDEN, JR.,

Defendants-Appellants.

Appeal from the United States District Court for the
Southern District of Florida

ON PETITION(S) FOR REHEARING
(January 21, 1986)

BEFORE: FAY and JOHNSON, Circuit Judges, and HOFFMAN*, District Judge.

PER CURIAM:

The petition(s) for rehearing filed by appellant NORMAN C. EDWARDS, JR. is denied.

ENTERED FOR THE COURT:

/s/ [Illegible]
United States Circuit Judge

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*Hon. Walter E. Hoffman, U.S. District Judge for the Eastern District of Virginia, sitting by designation.